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IN THE

Supreme Court of the United States

TIMOTHY STEWART,

Petitioner,

v.

UNITED STATES OF AMERICA.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a suspect is subjected to a two-stage "question first, warn later" custodial interrogation, is the "deliberate intent" inquiry adopted by Justice Kennedy in his concurring opinion in *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) the controlling test for determining whether the interrogation violates *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1062, 16 L. Ed. 2d 694 (1966)?

2. If "deliberate intent" is the proper inquiry, does determination of that intent require analysis under an objective standard subject to *de novo* review?

3. If the "deliberate intent" standard controls, may courts disregard the knowledge and intent of an interrogating officer if the lead investigator involved in the case denies an intent to circumvent *Miranda*?

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JURISDICTION

Petitioner Timothy Stewart filed his first notice of appeal in this matter on May 9, 2003. The Seventh Circuit remanded the matter to the district court for further findings in light of *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (App. E, 58a). The district court issued its Findings of Fact and Conclusions of Law pursuant to the remand on June 29, 2005 (App. D, 43a). Stewart moved to have the Findings of Fact and Conclusions of Law amended on July 6, 2005. The district court refused and instead treated this motion as a notice of appeal, entering it as such on the same day. The Seventh Circuit again remanded for further consideration, finding that the district court's analysis on remand had been too narrow (App. C, 35a). The district court entered Supplemental Findings of Fact and Conclusions of Law pursuant to the second remand on December 7, 2006 (App. B, 18a). Stewart filed his third notice of appeal on December 15, 2007. The Seventh Circuit affirmed the judgment of the district court on August 4, 2008 (App. A, 1a). No petition for rehearing was filed, and no request to extend the time to file a Petition for Writ of Certiorari was made. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction

On January 23, 2003, a jury found Petitioner Timothy L. Stewart guilty of one count of aggravated bank robbery and one count of using, carrying or brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. §§ 2113(a), 2113(d), and 924(c)(1)(A)(ii). On May 9, 2003, Judge Richard L. Young sentenced Stewart to a term of imprisonment of 159 months. The district court had jurisdiction pursuant to 18 U.S.C. §3231.

II. Statement of Facts[1]

Stewart was convicted based on a confession obtained through a sequential "question first" custodial interrogation in which officers provided *Miranda* warnings only after eliciting an initial confession. While Stewart's initial appeal in this matter was pending, this Court issued its decision in *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), addressing this type of two-stage "question-first" interrogation tactic. The Seventh Circuit remanded this case twice so that the district court could address whether Stewart's confession should be suppressed under the principles discussed in *Seibert*. *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004) ("*Stewart I*") (App. a, 1A); *United States v. Stewart*,191 Fed.Appx. 495 (7th Cir. 2006) ("*Stewart II*") (App. C, 35a).

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1. Testimony from the trial transcript is cited "TR __." Testimony from the hearing held pursuant to the Seventh Circuit's first remand is cited "REM __."

Stewart was detained at a "perimeter checkpoint" established by the Evansville Police Department following a report of a bank robbery because he fit a general description of the suspect. After speaking to Stewart for about 10 minutes, Corporal Timothy Nussmeier handcuffed Stewart, placed him in the backseat of his marked squad car, and told Stewart he was being detained (TR 19, 242-43). Stewart was not free to go (TR 19).

Detectives Dan Winters and Larry Nelson arrived at the intersection a short time later and spoke briefly with Nussmeier (TR 25). Winters indicated that the driver of the vehicle in which Stewart had been a passenger was free to go (TR 21). Stewart was not told he was free to leave (TR 338). After Stewart was taken out of Nussmeier's car, Winters removed the handcuffs because he "didn't know if Mr. Stewart was involved or not" (TR 25). Winters then placed Stewart into the backseat of his squad car, closed the door, and got into the front passenger seat (TR 300). Stewart told Winters, "Well, take me downtown" (TR 300, REM 90). When Winters asked why he said that, Stewart explained: "Well, you're going to arrest me anyway" (TR 301, REM 90). Winters did not disagree but, instead, asked "Are you the bank robber?" (REM 90). Stewart was not advised of his *Miranda* rights (TR. 32). Stewart denied involvement (REM 92).

While Winters was questioning Stewart in the detectives' car, Nelson learned that Stewart's telephone number had appeared on the caller i.d. of a cell phone recovered near the crime scene (TR 273). Nelson confronted Stewart: "This is your cell phone" (REM 76).

Winters "got out of the car real fast," removed Stewart from the backseat, handcuffed him, and returned him to the backseat (TR 27, REM 76, 93). Nelson again asked Stewart if he robbed the bank and Stewart again denied involvement (REM 104, TR 337). Stewart was not advised of his *Miranda* rights (TR 61).

At this point, Winters believed Stewart could be the bank robber and felt handcuffs were necessary so that Stewart would be less "likely to strike out" and would not be a "flight risk" (REM 76-77). Winters would not have let Stewart out of the car at that point if Stewart had asked (REM 78). At the pretrial hearing on Stewart's motion to suppress, Nelson testified that he did not know if he would have let Stewart out of the vehicle at that point (TR 62). At the hearing on remand, however, Nelson testified that he "absolutely" would have had to let Stewart go if Stewart had asked (REM 131). Neither detective ever told Stewart he was free to leave (TR 338). The Government argued on appeal, and the Seventh Circuit agreed, that Stewart was under arrest at this point based on adequate probable cause. *Stewart I*, 388 F.3d at 1086 n.2 (App. E, 69a).

While the detectives transported Stewart to the police station, Nelson continued questioning Stewart, asking two more times if Stewart had committed the robbery (TR 311, REM 127). Each time Stewart denied involvement. *Id.* Stewart was not advised of his *Miranda* rights.

Nelson and Winters placed Stewart in an eight-by-ten or -twelve foot interview room at the Evansville Police Department (TR 45, 66, 312, 341, REM 95, 127).

Stewart's handcuffs were removed, but he was in a locked facility that he could not leave unless let out by an officer (REM 95-96). Nelson testified at the hearing on remand that Stewart was still free to leave at this point (REM 120). Winters, in contrast, again testified that Stewart was not free to leave (REM 97). Stewart was not advised of his *Miranda* rights (TR 314, 346, REM 99).

With Winters' assistance, Nelson continued to interrogate Stewart (TR 38). Stewart asked the two detectives if he would be charged with a crime if he told them who committed the robbery (TR 35, 313, 345, REM 109). The detectives advised Stewart that he would not be charged if he had no direct involvement in the bank robbery (TR 313, 345, REM 110). Stewart then told the detectives that someone named Duel Felders had committed the robbery and that Stewart had provided him with a gun and a car to use during the crime (TR 346, REM 110).

Winters left the room to call dispatch and put a BOL out on Felders (TR 36). Nelson continued the interrogation, telling Stewart that a cell phone was found at the scene of the robbery with his number on it (REM 110, 112). Nelson admitted that he knew at this point that Stewart was not free to leave (REM 120, 133). Stewart was not advised of his *Miranda* rights. Nelson left the room briefly, and returned a few minutes later with FBI agents Martin Williams and Jim Beck (TR 36, REM 112).

Williams and Beck identified themselves as FBI agents. They told Stewart that this was a federal crime,

and that there would be additional charges because a weapon had been used (REM 17). Stewart asked what he would be charged with if he cooperated against Duel Felders (TR 113, 135). The agents responded, but Nelson did not recall what they said (REM 135, 113-14). Stewart then began to cry (TR 49, 314, REM 114). Nelson knew Stewart was "frightened... and upset" at this point (TR 65). Nelson testified at the hearing on remand: "As soon as he started crying, I asked him if he did it, and he said yes" (REM 136). Once Stewart had confessed, Nelson finally advised him of his *Miranda* rights (TR 50, 315, REM 137). A *Miranda* waiver form – which Nelson had with him throughout the interrogation (REM 144-45) – was executed (TR 317, REM 137). Stewart was never told that his pre-*Miranda* confession would be inadmissible (REM 139).

The interrogation then continued without interruption (REM 139). There was no break in time. *Id.* There was no change in location. *Id.* There was no change in interrogating personnel. *Id.* Stewart repeated his confession together with additional details (REM 121-127). The interrogation culminated with a recorded statement which was admitted, over objection, at Stewart's trial.

Both Nelson and Winters were seasoned police detectives with extensive training in interrogation methods. At the time of the robbery, Nelson had been a police officer for fourteen years, the last seven as a detective (TR 307). Winters had been a police officer for fourteen years, a detective for five (TR 298).

Detective Nelson testified on remand that he did not advise Stewart of his *Miranda* rights when Stewart was first moved from Nussmeier's to Winter's car, when Stewart was re-handcuffed after being connected to the cell phone, while Stewart was being transported to the police station, or while Stewart was being questioned at the police station prior to implicating Duel Felders because Nelson believed that at every one of these points Mr. Stewart was not in custody and remained free to leave (REM 118-19, 120-21).

Although Nelson knew that Stewart was in custody after he made the statement implicating Felders, Nelson claimed that his failure to provide the warnings until after Stewart confessed was an honest mistake. Nelson claimed that he did not advise Stewart of his rights before he left the interrogation room because he was in a "too big of a rush to get out and get information out on Duel Felders" (REM 143). Nelson testified that his failure to provide *Miranda* warnings after returning to the interrogation room to elicit Stewart's confession "had something to do with" the fact that "by that time the FBI was coming in the room, and they started talking to [Stewart]" (REM 120, 143).

Following the first remand, the district court found the interrogation of Stewart was not "a deliberate end run around *Miranda*," and both the pre- and post-warning statements were voluntary (App. D, 55a). Because the "district court's analysis was unduly limited to a consideration of whether the Evansville Police Department had an official policy endorsing two-step interrogation," the Seventh Circuit remanded the case a second time. *Stewart II*, 191 Fed. Appx. at 498

(App. C, 41a). The court held that "the district court's decision [did] not include the factual findings necessary for [the court] to meaningfully review its conclusion that the interrogation in this case was not deliberately calculated to circumvent *Miranda*." *Id.* at 499 (App. C, 41a). The court remanded to the district court a second time, instructing the district court to provide more specific fact-finding. *Id.*

Following the Seventh Circuit's second remand, the district court entered Supplemental Findings of Fact and Conclusions of Law (App. B, 18a). In its supplemental ruling, the district court found that the two-stage interrogation procedure was not a deliberate end-run around *Miranda* because Nelson believed that Stewart was not in custody (App. B, 31a). The district court found this professed belief credible based on Stewart's "request to enter the detectives' car . . . and his demand to be driven to the police station" (App. B, 31a). The district court also pointed to its own prior written finding on custody (App.B, 32a). The district court found that Nelson failed to *Mirandize* Stewart after he considered him to be in custody because Nelson was in "too big of a rush to get out and get the information out on Duel Felters (*sic*)" (App. B, 32a).

Applying a clear-error standard of review, the Seventh Circuit this time affirmed the district court's judgment. *Stewart III*, 536 F.3d at 720 (App. A, 1a). The court held that the district court did not clearly err in accepting Nelson's explanation for withholding *Miranda* warnings. *Id.* at 721 (App. A, 13a). In addition, the Seventh Circuit held that the district court was not required to consider Winters' reasons for withholding the *Miranda* warnings because Nelson was the lead investigator. *Id.* at 722 (App. A, 16a).

REASONS FOR GRANTING THE PETITION

Since first being issued in 1966, the warnings required by this Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), have "become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 2336, 147 L.Ed.2d 405 (2000). This Court has vigorously guarded this constitutional rule from attempts by both Congress and by law enforcement officers to circumvent *Miranda's* protections. *Dickerson*, 530 U.S. at 444, 120 S.Ct. at 2336, (*Miranda* rule may not be superseded legislatively); *Seibert*, 542 U.S. at 617, 124 S. Ct. at 2613 ("Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."); *Id.* 542 U.S. at 621, 124 S.Ct. at 2615 (Kennedy, J., concurring) ("The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect.").

The decision in *Seibert* reflects this Court's response to a new "question first" interrogation tactic devised to undermine the meaning and effect of *Miranda*. Yet the fractured decision of this Court has created uncertainty in how both trial courts and courts of review are to determine whether a particular two-stage, "question first" interrogation has violated *Miranda*. This Court should grant review to address: (1) whether *Seibert* requires a finding of "deliberate intent" before a two-stage interrogation will be found to violate *Miranda*; (2) if a "deliberate intent" test

applies, whether a deliberate intent finding is reviewed *de novo* and whether the test of intent is objective or subjective in nature; and (3) in determining "deliberate intent," whether courts must consider the intent of all officers involved in the interrogation or may limit the inquiry to the lead investigator.

I. Justice Kennedy's "deliberate intent" analysis does not represent the "narrowest grounds" for this Court's judgment in *Seibert*.

Following Justice Kennedy's concurrence in *Seibert*, the Seventh Circuit held that a sequential, "question first" interrogation does not implicate *Miranda* concerns unless the tactic was deliberately employed. *Stewart I*, 388 F.3d at 1090 (App. E, 80a-81a). The "deliberate intent" test adopted by Justice Kennedy stands in direct opposition to the opinions of the plurality and dissent in *Seibert*, which both unambiguously rejected consideration of officer intent in determining whether a *Miranda* violation has occurred. This Court should grant *certiorari* to clarify the controlling rule of law under *Seibert*.

In *Seibert*, the police arrested the defendant following the death of a mentally ill teenager in a fire at defendant's home. *Seibert*, 542 U.S. at 604, 124 S.Ct. at 2606. The defendant was interrogated for 30 to 40 minutes, without being advised of her *Miranda* rights, until she admitted that the victim was meant to die in the fire. *Id.* 542 U.S. at 605, 124 S.Ct. at 2606. Following a 20 minute coffee and cigarette break, the defendant was advised of her *Miranda* rights, waived those rights, and provided a tape recorded confession

including the details of the crime. *Id.* In eliciting the tape recorded confession, the officer made reference to the defendant's statements during the previous, unwarned interrogation. *Id.* 542 U.S. at 616, 124 S.Ct. at 2613. The interrogating officer candidly acknowledged that the *Miranda* warnings were purposefully withheld during the initial interrogation in order to elicit a confession. *Id.* 542 U.S. at 605-06, 124 S.Ct. at 2606.

The Supreme Court, in a split decision, held that the initial *Miranda* violation precluded admission of the subsequent tape recorded statement at trial. Writing for a plurality of the court, Justice Souter reasoned that the warnings of the question-first technique, which are provided only after unwarned interrogation successfully elicits a confession, may be ineffective. *Id* 542 U.S. at 612-13, 124 S.Ct. at 2610. Rather than reasonably conveying *Miranda* rights to the suspect, the post-confession warnings more likely bewilder and mislead the suspect. *Id.* 542 U.S. at 613-14, 124 S.Ct. at 2611. This is especially so when the interrogating officers warn the suspect that "anything you say can and will be used against you" without excepting the initial statements. *Id.* 542 U.S. at 613, 124 S.Ct. at 2611. "Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id.* 542 U.S. at 613-14, 124 S.Ct. at 2611, *quoting Moran v. Burbine*, 475 U.S. 412, 424, 106 S.Ct. 1135, 1142, 89 L.Ed.2d 410 (1986). In determining whether *Miranda* warnings could be effective enough to allow admission

of a confession, the plurality judged the circumstances against an "objective measure," focusing on "facts apart from intent that show the question-first tactic at work." *Seibert*, at 617 and n.6, 124 S.Ct. 2613 and n.6.

Justice Kennedy, writing separately, added the necessary fifth vote to exclude the confession but departed from the plurality's reasoning. Justice Kennedy agreed with the plurality that "the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made," thereby "misrepresent[ing] . . . the protection that *Miranda* offers." *Id.* 542 U.S. at 620-21, 124 S.Ct. at 2615 (Kennedy, J., concurring). Justice Kennedy further agreed that the officer's reliance on the prewarning statement to obtain the postwarning statement further misleads the accused as to the scope of *Miranda*'s protection. *Id.* 542 U.S. at 621, 124 S.Ct. at 2615. Nevertheless, Justice Kennedy would find the later statement inadmissible only "in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.*, 542 U.S. at 622, 124 S.Ct. at 2616.

Justice O'Connor, writing for the remaining four justices in dissent, agreed with the plurality's refusal to apply a fruit of the poisonous tree theory and with the plurality's "rejection of an intent-based test." *Id.* 542 U.S. at 623-24, 124 S.Ct. at 2617 (O'Connor, J., dissenting). The dissent, however, would analyze such two-step interrogations under the voluntariness standards addressed in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285 (1985), emphasizing that the officer's

reference to the unwarned statements in securing the later, warned confession was "a tactic that may bear on the voluntariness inquiry." *Id.* 542 U.S. at 628-29, 124 S.Ct at 2620. The dissent thus would not have held Seibert's tape recorded statement admissible, but would have remanded to the Missouri courts.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). "In practice, however, the Marks rule produces a determinate holding 'only when one opinion is a logical subset of other, broader opinions.'" *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*)). "When the plurality and concurring opinions take distinct approaches, and there is no 'narrowest opinion' representing the 'common denominator of the Court's reasoning,' then Marks becomes 'problematic.'" *Carizales-Toledo*, 454 F.3d at 1151, quoting *King*, 950 F.2d at 781, 782.

In voting to exclude Seibert's confession, Justice Kennedy agreed with the plurality's reasoning that a confession should be excluded where: (1) the interrogation strategy permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made; and (2) a pre-warning statement is used to obtain the post-warning statement. *Seibert*, 542 U.S. at 620-21, 124 S.Ct. at 2615. Justice Kennedy departed from the plurality,

however, in determining when the above two conditions are met. While Justice Kennedy would hold that these conditions are met only where the officers deliberately circumvented *Miranda* (*Id.* 542 U.S. at 622, 124 S.Ct. at 2616), the plurality would hold that these conditions are met where "facts apart from intent . . . show the question-first tactic at work." *Id.* 542 U.S. at 617, n.6, 124 S.Ct. at 2613, n.6.

The Seventh Circuit concluded that Justice Kennedy's deliberate intent requirement represents the controlling holding of the *Seibert* court. *Stewart I*, 388 F.3d at 1090 (App. E, 81a). Rather than being a "common denominator of the Court's reasoning" in *Seibert*, however, the deliberate intent test is directly contrary to the reasoning of both the plurality and dissent. *Carrizales-Toledo*, 454 F.3d 1150-51. Accord *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1138-41 (9th Cir. 2005) (Berzon, J., dissenting in part).

The fractured *Seibert* court split 4-1-4, with a plurality of four justices voting to bar all postwarning statements resulting from a two-step interrogation technique if the *Miranda* waiver was ineffective, focusing on factors other than the officers' intent. *Seibert*, 542 U.S. at 617 n.6, 124 S.Ct. 2613, n.6. Significantly, the four *Seibert* dissenters agreed with the plurality that the intent of the police should not be considered. *Id.* 542 U.S. at 624-27, 124 S.Ct. at 2617-19 (O'Connor, J. , dissenting). As Justice O'Connor stated in dissent, "[b]ecause the isolated fact of Officer Hanrahan's intent could not have had any bearing on Seibert's capacity to comprehend and knowingly relinquish her right to remain silent, . . . it could not by

itself affect the voluntariness of her confession." *Id.* 542 U.S. at 625, 124 S.Ct. at 2618.

Indeed, this Court has historically used an objective standard to analyze issues under *Miranda*. For example, "the availability of [the public safety] exception does not depend upon the motivation of the individual officers involved." *New York v. Quarles*, 467 U.S. 649, 656, 104 S.Ct. 2626, 2631, 81 L.Ed.2d 550 (1984). Similarly, when determining whether a suspect is "in custody," "[a] policeman's unarticulated plan has no bearing on the question." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). Rather, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* An officer's subjective knowledge that a suspect was the focus of an investigation is also irrelevant to whether or not the suspect was subject to custodial interrogation. *Beckwith v. United States*, 425 U S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). With regard to *Miranda* waivers, "whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Moran*, 475 U.S. at 423, 102 S.Ct. at 1142. This is so because "[e]vents occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. *Id.*

To depart from this settled precedent in favor of Justice Kennedy's deliberate intent requirement – a standard firmly rejected by a majority of the *Seibert* Court – would be contrary to both logic and precedent.

The *Marks* rule is not designed to elevate to controlling authority the opinion of a single justice. Because Justice Kennedy's focus on an officer's intent does not represent the narrowest ground of the Court's judgment within the meaning of *Marks*, it does not represent the holding of the *Seibert* court.

Each of the five justices voting to exclude Seibert's confession agreed that a confession should be excluded if (1) the interrogation strategy permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made; and (2) a pre-warning statement is used to obtain the post-warning statement. This Court should declare that this common denominator of the holding in *Seibert* represents the controlling rule of law and adopt the holding of the *Seibert* plurality concluding that this standard is met when facts apart from intent show the question first tactic at work.

II. Even if Justice Kennedy's "deliberate intent" requirement provides the proper analysis, an objective rather than subjective test for intent – reviewed *de novo* – is necessary if the *Seibert* decision is to have any effect.

In finding that the two-stage interrogation of Stewart did not violate *Miranda*, the district court relied entirely on its finding that Nelson was credible in testifying about his excuses for withholding the required warnings. Affording tremendous deference to the district court, the Seventh Circuit ruled that this credibility determination was not clearly erroneous. Basing a finding regarding deliberate intent purely on

an officer's subjective testimony, and reviewing that finding under a deferential standard, effectively reduces the inquiry under *Seibert* to a meaningless exercise. As the *Seibert* plurality recognized, "the intent of the officer will rarely be as candidly admitted as it was" in that case. *Seibert*, 542 U.S. at 617, n.6, 124 S.Ct. at 2613, n.6. Even if Justice Kennedy's focus on "deliberate intent" is the proper inquiry, courts necessarily must weigh objective evidence reflecting that intent and appellate courts must conduct an independent review if the *Seibert* decision is to have any meaning at all.

A. The deliberateness finding required by Justice Kennedy's concurrence, if controlling, should be subject to *de novo* review.

A split has developed among the circuit courts over the proper standard of review to be applied to a finding of "deliberate intent." Some courts, including the Seventh Circuit in this case, have explicitly reviewed the trial court's decision for clear error. *Stewart III*, 536 F.3d at 720 (App. A, 9a); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007); *United States v. Narvaez-Gomez*, 489 F.3d 970, 974 (9th Cir. 2007). Others appear to apply a *de novo* standard when reviewing whether the police deliberately used a "question first, warn later" method to circumvent *Miranda*. See *United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007); *United States v. Street*, 472 F.3d 1298, 1314 (11th Cir. 2006). See also *United States v. Black Bear*, 422 F.3d 658, 664 (8th Cir. 2005) (describing "deliberate intent" analysis as "legal conclusion"); *People v. Lopez*, 229 Ill.2d 322, __, 892 N.E.2d 1047, 1071 (Ill. S. Ct. 2008) (independently finding deliberate intent to circumvent *Miranda* even

though trial court found officer's denial of intent credible).

Although a "deliberateness" finding may logically seem to be factual – and, therefore, entitled to deference – in the context of "question first" interrogation deliberateness is in fact the type of mixed question as to which independent appellate review is critical. This Court's opinion in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), is instructive.

In *Ornelas*, this Court granted *certiorari* to address a circuit split over the standard of review applied to district court findings of reasonable suspicion and probable cause. *Id.* 517 U.S. at 695, 116 S.Ct. at 1661. This Court described both concepts as "commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Id.* quoting *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). In each case, the determination turns on "the events which occurred leading up to the stop or search, and . . . whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas*, 517 U.S. at 695. 116 S.Ct. at 1661. Notwithstanding the fact-intensive inquiry underlying a reasonable suspicion or probable cause finding, this Court nevertheless held that *de novo* review is required.

This Court cited three reasons for rejecting a more deferential standard of review. First, "[a] policy of

sweeping deference would permit, '[i]n the absence of any significant difference in the facts,' 'the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.'" *Id.* 517 U.S. at 697, 116 S.Ct. at 1662, quoting *Brinegar v. United States*, 338 U.S. 160, 171, 69 S.Ct. 1302, 1308, 93 L.Ed. 1879 (1949). In addition, because "the legal rules for probable cause and reasonable suspicion acquire content only through application," this Court concluded that "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697, 116 S.Ct. at 1662, citing *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985). Finally, this Court observed that "*de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *Ornelas*, at 697-98, quoting *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981).

For the same reasons, deliberate intent – if indeed the controlling standard – should be subject to *de novo* review. First, sweeping deference here – just as with probable cause or reasonable suspicion – would lead to different results despite the absence of any significant difference in the underlying facts. Indeed, the striking parallels between the facts in this case and those in *Seibert* starkly illustrate this point. In both cases, a suspect was subjected to custodial interrogation without *Miranda* warnings. In both cases, the unwarned

suspect confessed. In both cases, once the necessary confession was elicited, *Miranda* warnings were provided and a second, now warned, confession was extracted. Yet the second confession was suppressed in *Seibert* and not in this case only because in *Seibert* the interrogating officer candidly admitted that the two-stage strategy was intentionally employed.

In addition, because the legal rules for determining deliberate intent will acquire content only through application," *de novo* review will be necessary if "appellate courts are to maintain control of, and to clarify, the legal principles." Deliberate intent to circumvent *Miranda* will rarely be so candidly admitted as it was in *Seibert*. Yet, if a deliberate intent finding is to turn solely on the credibility of an officer's self-reported intent, and if reviewing courts defer broadly to the district courts' determinations on this question, appellate courts will have little room to shape the principles governing when a confession obtained through a two-step, "question first" tactic will be admissible. Because (as argued below) objective factors must be considered in determining deliberate intent, *de novo* review is necessary to insure that reviewing courts are able to maintain control of and clarify the objective test to be applied.

Finally, *de novo* review will help unify precedent and provide law enforcement officers clearer guidance as to when corrective measures will be necessary in the wake of an unwarned confession. The *Seibert* problem only arises where an officer has clearly realized that *Miranda* warnings are necessary before eliciting a second confession – by the time the second confession is elicited,

the officer has recognized the problem with the first. A defined set of rules for determining deliberate intent will enable officers to more easily determine beforehand whether corrective measures will be required before the subsequent, warned confession is elicited.

If "deliberate intent" is the controlling standard, this Court should adopt a searching standard of review in which the district court's findings with respect to the historical facts would be reviewed for clear error and the ultimate determination of deliberateness *de novo*.

B. A finding of deliberateness must be based on objective facts, not merely self-serving testimony regarding an officer's intent.

The Ninth Circuit's opinion in *United States v. Williams*, 435 F.3d 1148, 1158-61 (9th Cir. 2006) offers the most comprehensive discussion to date with respect to how courts should determine whether an investigator used a deliberate two-step strategy. Recognizing that "the intent of the officer will rarely be as candidly admitted as it was" in *Seibert*, the *Williams* court held that:

> [F]ocusing on both "facts apart from intent that show the question-first tactic at work," [citation] and any available subjective evidence of deliberateness, courts will better ensure that law enforcement officers do not circumvent the Fifth Amendment right against self-incrimination through the use of "interrogation practices . . . likely . . . to disable

> [an individual] from making a free and rational choice" about speaking.

Williams, at 1159, *citing Seibert*, 542 U.S. at 616-17, n. 6, 124 S.Ct. at 2613, n.6 (Souter, J.) and *Miranda v. Arizona*, 384 U.S. 436, 464-65, 86 S.Ct. at 1602 (1966).

To determine whether the deliberate two-step strategy was employed, the *Williams* court looked to historical "'facts apart from intent' . . . and any subjective evidence of deliberateness." *Williams*, 435 F.3d at 1159. Historical facts – such as the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements, together with any evidence of an officer's subjective intent – would be considered in determining whether the two-step interrogation technique was used in a calculated way to undermine the Miranda warning. *Id.*

The objective facts in this record thoroughly undermine Nelson's self-serving disavowal of an intent to undermine *Miranda*. Stewart was initially stopped at a perimeter checkpoint, handcuffed, and detained for questioning (TR 242-43). Winters removed Stewart's handcuffs when he and Nelson initiated questioning but re-handcuffed Stewart after learning that Stewart's cell phone had been recovered near the scene of the robbery. The Seventh Circuit held, and the Government agreed, that Stewart was under arrest at this point *Stewart I*, 388 F.3d at 1085 n.2 (App. E, 69a). Though Winters admitted he knew Stewart was not free to leave once he was re-handcuffed (REM 78), and Nelson initially testified that he was not sure if Stewart would have been

allowed to leave at this point (TR 62), Nelson testified at the hearing following the Seventh Circuit's first remand that he "absolutely" would have allowed Stewart to leave at this point had Stewart asked (REM 131). The district court believed that Nelson did not think Stewart was in custody and the Seventh Circuit did not question that finding.

Stewart was then transported to a locked police facility (TR 27). Nelson and Winters continued to question Stewart, still withholding any *Miranda* warnings (TR 38). Nelson insists he still believed Stewart was free to go at this point and again the district court believed him. The Seventh Circuit again deferred to this finding.

Stewart then offered a statement indicating that someone named Duel Felders had committed the robbery and that Stewart had provided Felders with a gun and car used in the offense (TR 346, REM 110). At this point, even Nelson admitted that he knew Stewart was in custody (REM 120, 133). Nevertheless, he still did not provide *Miranda* warnings. He explained that his failure to advise Stewart of his rights at this point resulted from his "rush to get out and get the information out on Duel Felders" (REM 143). The district court found this excuse plausible and the Seventh Circuit deferred to that finding.

Nelson then returned to the interrogation room, this time accompanied by two FBI agents (TR36, REM 112). Stewart began to cry, and Nelson believed Stewart was now "frightened . . . and upset" (TR 65). No longer in a rush to get information out on Felders, and well aware

that Stewart was in custody, Nelson still did not provide *Miranda* warnings. Instead, he continued to question Stewart, ultimately eliciting the confession he was after (REM 136). Nelson's only explanation for his failure to provide the required warnings at this point is that it "had something to do with" the FBI entering the room to question Stewart and Nelson's purported belief that "it was not [his] case" once the FBI became involved. (REM 120-21, 143). Remarkably, this explanation was good enough for both the district court and the Seventh Circuit.

Once Stewart confessed, Nelson suddenly remembered the required *Miranda* warnings and quickly secured Stewart's written waiver of his rights (REM 137). Interrogation then continued apace, with no break, no change in personnel, and no change in environment. Stewart was not informed that he'd had a right to remain silent prior to confessing or that the confession he had already given could not be used against him (REM 139). Although the record is vague as to the questions asked during the post-*Miranda* phase of the interrogation, it is clear that the officers asked Stewart to repeat his confession and made reference to the pre-*Miranda* questioning (REM 121-27, TR 353).

These facts demonstrate the question-first tactic functioning precisely as it was designed to. Indeed, the interrogation in this case is virtually indistinguishable from the interrogation condemned in *Seibert* – with the exception that the defendant in *Seibert* enjoyed the benefit of a 20-minute break between the unwarned and warned interrogations. *Seibert*, 542 U.S. at 605, 124 S.Ct.

at 2606. Accordingly, Stewart's confession, like the confession in *Seibert*, resulted from an improper question-first interrogation tactic and must be suppressed unless curative measures were employed sufficient to render the belated *Miranda* warnings effective. *Seibert*, 542 U.S. at 615-16, 124 S.Ct. at 2612; *Id.* 542 U.S. at 621-22, 124 S.Ct. 2616 (Kennedy, J. concurring.). No such curative measures were employed.

As a result of the subjective standard applied by the district court and the deferential review conducted by the Seventh Circuit, the government was allowed to rely on a confession elicited pursuant to an interrogation no less objectively violative of *Miranda* than the interrogation which necessitated suppression of the confession in *Seibert*. This Court should grant review to unify and clarify the standards applicable to such cases.

III. If a "deliberate intent" test applies, courts must consider the intent of each officer who participated in the interrogation without providing *Miranda* warnings.

Finally, whatever standard is applied in assessing and reviewing deliberate intent, that standard cannot possibly ignore the role of an officer involved in virtually the entirety of the interrogation process simply because someone else was "in charge." The *Seibert* decision aimed to prevent clever interrogators from circumventing *Miranda*. By holding that the district court properly ignored Winter's intent in light of Nelson's denial that he acted deliberately, the Seventh Circuit has opened up a loophole through which clever interrogators might circumvent *Seibert*.

Here, Winters began questioning Stewart shortly after Stewart was first apprehended at the perimeter checkpoint (REM 90). Winters was continuously present for and assisted in the ongoing interrogation right up to the point when Stewart implicated Felders in the crime – just minutes before finally confessing (TR 36, 38, 311). The Government offered no evidence to explain Winters' failure to provide warnings – despite Winters' admitted knowledge that Stewart was not free to leave (REM 78). A finding that the two-stage interrogation of Stewart did not violate *Miranda* could only be upheld under Justice Kennedy's deliberate intent test if Winters' intent is ignored. This is precisely what the district court chose to do in this case and precisely the approach endorsed by the Seventh Circuit. Such an analysis cannot be accepted.

As the Ninth Circuit recognized in *Williams*, deferral of *Miranda* warnings until after a suspect provides an incriminating response supports an inference of a deliberate intent to circumvent *Miranda*. *Williams*, 435 F.3d at 1159 ("the most plausible reason for the delay [in advising a suspect of his *Miranda* rights] . . . is the interrogator's desire to weaken the warning's effectiveness"). The record contains no evidence – and the district court made no finding – to rebut the inference that Winters acted deliberately.

The fact that Nelson was the "lead investigator" and Winters was playing a "supporting role in the interrogation" does not somehow render Winters' intent irrelevant as the Seventh Circuit held. Winters was present for and assisted in virtually the entirety of the unwarned interrogation of Stewart, withdrawing only moments before Stewart finally confessed. He, no less than Nelson, had an obligation to ensure that Stewart's constitutional rights were being honored. The Seventh Circuit's approach allows – indeed, encourages – subordinate officers to quietly ignore a recognized violation of *Miranda* so long as the officer in charge testifies that the violation was an honest mistake. This Court should grant review to make clear that even subordinate officers must speak up when they recognize that *Miranda* is being violated – however inadvertently.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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